In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 658

SEYMOUR R. RAYOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals dismissing petitioner's appeals and denying the timely petition for rehearing are not officially reported (Pet. App. 3–11).

JURISDICTION

The order of the court of appeals dismissing petitioner's appeals was entered on September 12, 1963. The petition for rehearing was denied on October 8, 1963. An extension of time within which to file the petition for a writ of certiorari to and including December 7, 1963 was granted by Mr. Justice Doug-

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las. The petition was filed on December 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure on grounds other than newly discovered evidence was timely if it was filed more than five days after the jury's verdict of guilt.

2. Whether the district court abused its discretion in denying petitioner's motion for a new trial based on newly discovered evidence.

RULES INVOLVED

Rules 23, 31, 32, 33 and 34 of the Federal Rules of Criminal Procedure are set out in the Appendix, *infra*, pp. 8–9.

STATEMENT

On November 14, 1962, petitioner was found guilty by a jury in the United States District Court for the Southern District of California of wilfully making and subscribing a false corporate income tax return for the year 1955 in violation of Section 7206(1) of the Internal Revenue Code of 1954 (R. 2, 151).[1] On December 20, 1962, the court sentenced petitioner to six months imprisonment and a fine of $4,000. It then suspended the execution of the prison sentence and placed petitioner on probation for two years on condition that he pay the imposed fine (R. 152–153).

[1] "R." refers to the clerk's transcript of proceedings in the court of appeals.

On the same day that this judgment was entered, petitioner's counsel orally advised the court of his intention to file a motion for a new trial, and the matter was set for hearing on January 14, 1963 (R. 152). On January 4, 1963, petitioner filed a written motion for a new trial, asserting several grounds other than newly discovered evidence in support thereof. On January 10, 1963, he filed a second motion for a new trial which was based on allegedly newly discovered evidence (R. 154–155, 162–167). After the hearing on January 14, 1963, the district court denied the motion for a new trial based on newly discovered evidence (R. 168), and on the following day, it dismissed petitioner's first motion for a new trial on the ground that it "was not made within the time as provided in Rule 33 of the Federal Rules of Criminal Procedure" (R. 169).

Petitioner appealed separately from the district court's denial of each of his motions. The court of appeals, on motion of the government, summarily dismissed petitioner's appeals. On petition for rehearing, the court of appeals set forth the reasons for its prior dismissals, stating that petitioner's first motion for a new trial was untimely and that his second motion (based on newly discovered evidence) was properly rejected on the merits by the district court.

ARGUMENT

The court of appeals was clearly correct in dismissing both of petitioner's appeals. His motion for a new trial on grounds other than newly discovered

evidence was untimely irrespective of the date from which the allotted 5-day period began to run. His motion alleging newly discovered evidence failed to satisfy the established standards for such relief. And his notices of appeal from the denial of these motions could not serve as an appeal from his conviction since they were untimely with respect to that judgment.

1. Under Rule 33 of the Federal Rules of Criminal Procedure, petitioner had 5 days "after verdict or finding of guilty" within which to file a motion for a new trial on grounds other than newly discovered evidence. Assuming, *arguendo*, that the Rule's reference to "verdict" and "finding of guilty" relates to the date on which sentence is imposed and judgment entered, petitioner's time within which to file such a motion expired no later than December 28, 1962, which was a Friday.[2] His motion was filed on January 4, 1963. Hence it was properly dismissed as out-of-time.

Although petitioner does not say so expressly, he implies that the district court's order setting the time for a hearing on his anticipated motion for a new trial constituted an extension of time within which to file such a motion to January 14, 1963. Neither the remarks made orally by the trial judge in response to the expressed intention of petitioner's

[2] This computation grants petitioner 5 non-holiday weekdays. Rule 45 requires only that intermediate Sundays and holidays be excluded, but granting petitioner the benefit of the possibility that the state clerk's office may have been closed on Saturdays, cf. *Berman* v. *United States*, No. 245, this Term, certiorari granted, 375 U.S. 878, his time expired no later than December 28.

counsel to file such a motion[3] nor the official entries in the clerk's docket support this view. These references suggest only that the court was setting a date for a hearing on a motion which was to be filed within the time allotted by the Federal Rules. Nor is there any merit to the contention, not pressed here, that counsel's expression of intention on December 20 amounted to an oral motion for a new trial. This argument was considered and conclusively rejected by the court of appeals (Pet. App. 9, n. 2).

2. Moreover, Rule 33—unlike Rule 34—requires the motion for a new trial to be filed within 5 days of "verdict" or "finding of guilty." Rule 31, which is titled "Verdict," patently relates that term to the jury's decision at the conclusion of the trial, and not to the court's subsequent imposition of sentence or to the clerk's entry of the judgment of conviction. The word "finding" also appears in Rule 23(c), which refers to the trial judge's conclusions as to the underlying facts and the guilt of the defendant, not to the official judgment of conviction. Finally, Rule 32(b) expressly provides that the judgment shall contain "the verdict or findings," indicating thereby that "verdict" and "findings," as used in the Federal Rules of Criminal Procedure, do not mean the same as "judgment" or "conviction." Consequently, petitioner's time to file his motion under Rule 33 ran from the date on which the jury brought in its verdict—November 14, 1962—and not from the date on

[3] The colloquy on December 20, 1962, began with petitioner's counsel saying, "We *intend* to file a motion for new trial" (Pet. 3, n. 1). [Emphasis added.]

which sentence was imposed. The motion filed on January 4, 1963, was, therefore, out-of-time.*

Petitioner's argument to the contrary is based on his erroneous extension of *Lott* v. *United States*, 367 U.S. 421, 426, wherein this Court, in construing that part of Rule 34 which requires a motion in arrest of judgment to be made within five days after "determination of guilt," held that "it was the judgment of conviction and sentence, and not the pleas of *nolo contendere*, that constituted the 'determination of guilt' within the meaning of Rule 34." The short answer to petitioner's reliance upon *Lott* is that the instant case involves Rule 33, and not Rule 34, and, as has been demonstrated, there is no ambiguity of language here which requires interpretation by this Court.

3. Petitioner's contention that his motion for a new trial on grounds of newly discovered evidence (which was timely under Rule 33) was erroneously denied presents no issue calling for this Court's consideration. The motion was vague and conclusory, and it failed to explain why the allegedly newly discovered evidence had not been discovered earlier (Pet. App. 6–7). Consequently, the court of appeals properly concluded that the district court had not abused its discretion in denying the motion.

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* Even if the motion for a new trial is considered as having been made orally on December 20, 1962, it was then out-of-time because it was made more than a month after the verdict. Since Rule 33 requires extensions of time to be made "during the 5-day period," any implied extension granted on December 20, 1962, was obviously untimely as well.

4. Petitioner apparently does not seek review of his judgment of conviction as such, apart from the dismissal and denial of his motions for a new trial. Under Rule 37(a)(2) of the Federal Rules of Criminal Procedure, petitioner had 10 days from the date on which judgment was entered (December 20, 1962) in which to file a notice of appeal. By the terms of Rule 37(a)(2), this time could be automatically extended if a motion for a new trial were filed "within the 10-day period." The allowable 10-day period expired on December 31, 1962,[5] and no motion for a new trial was filed within that time. The court of appeals therefore correctly concluded that any appeal from the judgment of conviction was untimely and had to be dismissed (Pet. App. 8–10). *United States* v. *Robinson*, 361 U.S. 220.

CONCLUSION

Further review by this Court is unwarranted. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1964.

[5] Since the time for taking an appeal is not "less than 7 days," intermediate Sundays and holidays enter into the computation. Rule 45(a), Federal Rules of Criminal Procedure. Hence only the concluding Sunday—December 30—is omitted.

APPENDIX

Federal Rules of Criminal Procedure:

RULE 23. TRIAL BY JURY OR BY THE COURT.

* * * * * *

(c) *Trial without a Jury.* In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

RULE 31. VERDICT.

(a) *Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

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RULE 32. SENTENCE AND JUDGMENT.

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(b) *Judgment.* A judgement of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

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RULE 33. NEW TRIAL.

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new

judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

RULE 34. ARREST OF JUDGMENT.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

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